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8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

10  
11 CITY OF SAN JOSE,

12 Plaintiff,

13 v.

14 SAN JOSE POLICE OFFICERS'  
ASSOCIATION, SAN JOSE  
15 FIREFIGHTERS, I.A.F.F. LOCAL 230;  
MUNICIPAL EMPLOYEES' FEDERATION,  
16 AFSCME, LOCAL 101; CITY  
ASSOCIATION OF MANAGEMENT  
17 PERSONNEL, IFPTE, LOCAL 21,

18 Defendants.

Case No. 5:12-CV-02904-LHK

**CITY OF SAN JOSE'S OPPOSITION TO  
DEFENDANT SAN JOSE POLICE  
OFFICERS' ASSOCIATION'S MOTION  
FOR ATTORNEY FEES**

Hearing Date: September 12, 2013  
Time: 1:30 p.m.  
Dept: 8

Judge: Hon. Lucy H. Koh

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CASE NO. 5:12-CV-02904-LHK

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
INTRODUCTION.....	1
RELEVANT FACTS .....	2
ARGUMENT .....	4
I. UNDER FEDERAL LAW – WHICH GOVERNS THIS MOTION – THE POA IS NOT ENTITLED TO ATTORNEY FEES OR COSTS BECAUSE IT WAS VOLUNTARILY DISMISSED WITHOUT PREJUDICE UNDER FEDERAL RULE 41(A)(1)(A)(I).....	4
A. A Plaintiff Who Is Voluntarily Dismissed Without Prejudice Under Rule 41(a)(1)(A)(i) Is Not Entitled to Attorney Fees or Costs. ....	4
B. Federal Law Governs This Motion. ....	6
II. EVEN IF CALIFORNIA LAW GOVERNED – WHICH IT DOES NOT – THE POA IS NOT ENTITLED TO ATTORNEY FEES OR COSTS UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1021.5. ....	7
A. The POA Is Not a “Successful Party” Because It Cannot Establish the Catalyst Theory’s Causation Prong. ....	8
B. The POA Did Not Vindicate “Important Rights.” ....	9
C. The POA’s Motion Ignores that Measure B Is Being Vigorously Litigated in State Court. ....	11
III. THE AMOUNT OF THE POA’S FEE REQUEST IS UNREASONABLE .....	11
IV. CONCLUSION .....	13

**TABLE OF AUTHORITIES****Page(s)****CASES**

<i>Advanced Engineering Solution, Inc. v. Paccar, Inc.</i> , No. CV-00986-LHK, 2012 U.S. Dist. LEXIS 130312 (N.D. Cal. Sept. 12, 2012) .....	4, 5
<i>Buckhannon Bd. &amp; Care Home, Inc. v. W. Va. Dep't of Health &amp; Human Res.</i> , 532 U.S. 598 (2001) .....	5
<i>Cadkin v. Loose</i> , 569 F.3d 1142,1145 (9th Cir. 2009) .....	5
<i>Cates v. Chiang</i> , 213 Cal.App.4th 791 (2013) .....	8
<i>City of Carmel-By-The-Sea v. U.S. Dept. of Transp.</i> , 123 F.3d 1142 (9th Cir.) .....	6
<i>Delson v. Cyct Mgmnt Group Inc.</i> , No. C 11-03781-MEJ, 2013 U.S. Dist. LEXIS 62499 (N.D. Cal. April 30, 2013) .....	6
<i>Gens v. Wachovia Mortgage Corp.</i> , 10-CV-01073-LHK, 2011 U.S. Dist. LEXIS 97401 (N.D. Cal. Aug. 30, 2011) .....	11
<i>Graham v. DaimlerChrysler Corp.</i> , 34 Cal.4th 553 (2004) .....	8
<i>Hanford Executive Mgmnt Employee Ass'n v. City of Hanford</i> , No. CV-00828-AWI-DBL, 2012 U.S. Dist. LEXIS 23161 (E.D. Cal. Feb. 23, 2012) .....	10
<i>Karuk Tribe of Northern Cal. v. Cal. Regional Water Quality Control Bd., North Coast Region</i> , 183 Cal.App.4h 330, 363 (2010) .....	7, 8
<i>MRO Communications, Inc. v. American Telephone &amp; Telegraph Co.</i> , 197 F.3d 1279 (9th Cir. 1999) .....	1, 6
<i>Rose v. Discovery Financial Services, Inc.</i> , No. CV-00425-LHK, 2012 U.S. Dist. LEXIS 70036 (N.D. Cal. May 18, 2012) .....	1, 5
<i>Wal-Mart Real Estate Business Trust v. City Council of the City of San Marcos</i> , 132 Cal.App.4th 614 (2005) .....	9, 10
<i>Wilson v. City of San Jose</i> , 111 F.3d 688 (9th Cir. 1997) .....	12

## INTRODUCTION

The SJPOA has filed a fee motion based entirely on California law, but that is the wrong body of law. Federal law, not state law, applies to the POA's fee motion, and the POA is not entitled to fees under federal law. Furthermore, even if California law did apply, the POA is not entitled to fees under the California Private Attorney General Act (Cal. Code of Civil Procedure section 1021.5) because it cannot establish the necessary elements.

First, under federal fee law, a party voluntarily dismissed under Rule 41(a)(1)(A)(i) is not entitled to fees. Here, the City voluntarily dismissed the POA without prejudice under Rule 41(a)(1)(A)(i), and the POA's motion must be denied. *Rose v. Discovery Financial Services, Inc.*, No. CV-00425-LHK, 2012 U.S. Dist. LEXIS 70036, at \*8-9 (N.D. Cal. May 18, 2012). Federal law governs the POA's fee request because the court did not decide any state-law claim. *MRO Communications, Inc. v. American Telephone & Telegraph Co.*, 197 F.3d 1279, 1281 (9th Cir. 1999).

Second, even if California law applied, the POA is not entitled to attorney fees under Code of Civil Procedure section 1021.5. The POA cannot establish that its litigation (its federal motion to dismiss) caused the City to voluntarily dismiss the federal action. Rather, the evidence shows that the City dismissed the federal action because (1) the state court denied the City's motion to stay the consolidated Measure B state-court actions and (2) the City determined it would be wasteful to litigate in both the state and federal forums simultaneously. Based solely on its inability to demonstrate causality between its federal motion to dismiss and the City's voluntary dismissal, the POA is not entitled to section 1021.5 fees.

The POA also is not entitled to 1021.5 fees because its federal motion to dismiss did not vindicate any important rights. The POA's argument on this element assumes that it prevailed on its motion to dismiss and that the City's federal motion was unripe and procedurally improper. The Court did not make such a ruling, and the City contends its First Amended Complaint would have survived the motion to dismiss in its entirety. In any event, the POA subsequently stipulated to the

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1 City bringing its federal claims in state court through a cross-complaint, and these claims are now  
2 being litigated in state court. For this separate reason, the POA is not be entitled to section 1021.5  
3 fees.

4 Should the Court conduct a section 1021.5 analysis (which is unnecessary given that federal  
5 law applies), the POA's motion must be viewed against the backdrop of the current legal landscape:  
6 the parties continue to vigorously litigate Measure B in state court. The City's dismissal of the POA  
7 did not invalidate Measure B, or bring the POA any close to achieving its substantive goal of  
8 invaliding Measure B.

9 Finally, the amount of the POA's fee request is unreasonable. The POA is seeking over 180  
10 hours of fees for preparing a motion to dismiss that resulted in no substantive ruling regarding  
11 Measure B and that were in part incurred after the City informed the POA of its intention to proceed  
12 solely in state court in light of the state-court's denial of its motion-to-stay. As a result, the POA  
13 should not be awarded fees for excessive number of hours it requested although, as a practical  
14 matter, the Court should never reach this issue: the POA is not entitled to any fees under federal or  
15 state law, and its motion must be denied.

#### 16 **RELEVANT FACTS**

17 The City filed the complaint in this federal action on June 5, 2012. (Docket No. 1  
18 ("Complaint for Decl. Relief").) The City's complaint sought a declaratory judgment that certain  
19 provisions of Measure B, the City of San Jose's pension reform measure, do not violate the federal  
20 and state contract clauses and various other federal and state laws. (*Id.*) The City's federal action  
21 was filed in order to consolidate all interested parties and their federal-law and state-law claims into  
22 a single, efficient action. (Declaration of Linda Ross in Support of Opposition to POA's Motion for  
23 Attorney Fees ("Ross Decl."), ¶3.)

24 The City filed in federal court based on the Court's original jurisdiction over the City's  
25 federal-law claims. (Docket No. 1, ¶¶1, 17; Docket No. 33 ("First Amended Complaint for Decl.  
26 Relief"), ¶¶1, 19 .) The City requested that the court exercise supplemental jurisdiction over the  
27 City's state-law claims. (*Id.*)

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1 On June 6, 2012, City of San Jose unions, employees, and retirees began filing five separate  
 2 state-court actions in Santa Clara County Superior Court challenging Measure B on state-law claims  
 3 only. (Ross Decl., ¶4.)

4 In late June 2012, defendants in this federal action began filing motions to dismiss, which  
 5 were set for hearing on October 4, 2012. (Docket Nos. 8-22, 41-43, & 56-59.)

6 In early August 2012, the City filed a motion in Santa Clara Superior Court to consolidate  
 7 and stay the state-court actions. (Ross Decl., ¶6.) The City contended that the state-court cases  
 8 should be stayed so that the parties could litigate this federal action, which was the first-filed, and  
 9 most comprehensive, of all Measure B lawsuits. (*Id.*) The City stated that its goal was a “fair,  
 10 efficient and comprehensive resolution of all claims related to Measure B.” (*Id.*)

11 At a hearing on August 23, 2013, the Santa Clara Superior Court granted the City’s motion  
 12 to consolidate the five cases for pretrial purposes, but denied the City’s motion to stay the cases  
 13 pending the outcome in this federal action. (Ross Decl., ¶7 & Ex. A.) Although the City believed  
 14 that its FAC would survive the federal motions to dismiss, the City realized that its federal action  
 15 would then be proceeding in tandem with the consolidated state-court actions. (*Id.* at ¶8.) Because  
 16 the state-court plaintiffs had agreed to consent to the City’s filing a state-court cross-complaint  
 17 raising federal claims, the City elected to dismiss its federal action without prejudice. (*Id.*)

18 Critically, the City dismissed its federal suit to avoid the expense of litigating a multiplicity  
 19 of actions. (Ross Decl., ¶9.) The City alerted the Court prior to the hearing on the POA’s motion to  
 20 dismiss in order to spare the Court the time and expense of preparing for the hearing. (*Id.*) The City  
 21 did not dismiss its federal action because it feared losing the motion to dismiss. (*Id.* at ¶10.) On the  
 22 contrary, the City believed, and continues to believe, it would have prevailed. (*Id.*) But such a  
 23 victory – in light of the state court’s ruling denying the stay motion – would not have eliminated the  
 24 simultaneous and inefficient adjudication of Measure B in two forums. (*Id.*)

25 Consequently, on October 1, 2012, the City dismissed without prejudice the POA and  
 26 AFSCME pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i). (Docket No. 80.) Neither the POA nor  
 27 AFSCME had filed a motion for summary judgment or an answer.

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On October 2, 2012, the City and the remaining defendants stipulated to a Fed. R. Civ. P. 41(a)(2) dismissal under which each was responsible for its own attorney fees and costs. (Docket No. 90.)

In late October 2012, pursuant to stipulation of the parties to the state-court action, *including the POA*, the City filed its state-court cross-complaint raising federal-law claims. (Ross Decl., ¶13.) No cross-defendant has demurred to the City's cross-complaint or filed a motion for summary judgment or adjudication. (*Id.* at ¶14.) In March 2013, the Court denied a motion for preliminary injunction filed by several plaintiffs. (*Id.*)

The City's motion for summary adjudication is set for hearing on June 7, 2013. (Ross Decl., ¶15.) The consolidated state-court actions are currently set for trial on July 22, 2013. (*Id.*)

### ARGUMENT

#### **I. UNDER FEDERAL LAW – WHICH GOVERNS THIS MOTION – THE POA IS NOT ENTITLED TO ATTORNEY FEES OR COSTS BECAUSE IT WAS VOLUNTARILY DISMISSED WITHOUT PREJUDICE UNDER FEDERAL RULE 41(A)(1)(A)(I).**

##### **A. A Plaintiff Who Is Voluntarily Dismissed Without Prejudice Under Rule 41(a)(1)(A)(i) Is Not Entitled to Attorney Fees or Costs.**

Pursuant to Federal Rule of Civil Procedure 41(a), a plaintiff may dismiss an action without a court order by filing “a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment.” Fed. R. Civ. P. 41(a)(1)(A)(i). “Unless the notice ... states otherwise, the dismissal is without prejudice.” Fed. R. Civ. P. 41(a)(1)(B).

“Under Rule 41(a)(1), a plaintiff has an absolute right to voluntarily dismiss his action prior to service by the defendant of an answer or a motion for summary judgment.” *Advanced Engineering Solution, Inc. v. Paccar, Inc.*, No. CV-00986-LHK, 2012 U.S. Dist. LEXIS 130312, at \*4 (N.D. Cal. Sept. 12, 2012) (quoting *Wilson v. City of San Jose*, 111 F.3d 688, 692 (9th Cir. 1997) (internal citations omitted)).

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1 A plaintiff who is voluntarily dismissed without prejudice pursuant to Rule 41(a)(1)(A)(i) is  
 2 not entitled to attorney fees and costs. *Rose v. Discovery Financial Services, Inc.*, No. CV-00425-  
 3 LHK, 2012 U.S. Dist. LEXIS 70036, at \*8-9 (N.D. Cal. May 18, 2012).

4 Both U.S. Bancorp and AES request reimbursement of fees and costs.  
 5 A court may impose costs and attorneys' fees upon a plaintiff who is  
 6 granted a voluntary dismissal under Fed. R. Civ. P. 41(a)(2).  
 7 *Stevedoring Servs of Am.* 889 F.2d [919,] 921 [9th Cir. 1989]. Rule  
 8 41(a)(2) applies to a voluntary dismissal only if a defendant files an  
 9 answer or a motion for summary judgment before a plaintiff seeks to  
 10 voluntarily dismiss an action. Therefore, 41(a)(2) does not apply here  
 11 because AES and U.S. Bancorp did not serve either an answer or a  
 12 motion for summary judgment before Plaintiff filed his Request for  
 dismissal. *See Wilson [v. City of San Jose]*, 111 F.3d [688,] 692 [9th  
 Cir. 1997]. Instead, Plaintiff's claims against U.S. Bancorp and AES  
 were dismissed upon Plaintiff's filing of his Requests for dismissal  
 pursuant to Rule 41(a)(1), which automatically terminates the action  
 without a court order and without an awarding of fees and costs. *Id.*  
 Thus, U.S. Bancorp and AES cannot seek fees and costs pursuant to  
 Fed. R. Civ. P. 41(a)(2). Accordingly, U.S. Bancorp's and AES's  
 requests for fees and costs are DENIED.

13 *Id.*; *Advanced Engineering Solution, Inc. v. Paccar, Inc.*, No. CV-00986-LHK, 2012 U.S. Dist  
 14 LEXIS 130312, at \*6-7 (N.D. Cal. Sept. 12, 2012).

15 [A]lthough [plaintiffs] insist that they should be awarded costs and  
 16 fees in the event of a dismissal without prejudice, the Court may  
 17 impose costs and fees upon a plaintiff as a condition of voluntary  
 18 dismissal only pursuant to Federal Rule of Civil Procedure 41(a)(2),  
 19 not Rule 41(a)(1)(A)(i). Rule 41(a)(2) applies to a voluntarily  
 20 dismissal only if a defendant files an answer or a motion for summary  
 21 judgment before the plaintiff seeks to voluntarily dismiss the action.  
 As previously discussed, neither [plaintiff] has filed an answer or a  
 motion for summary judgment, and therefore Rule 41(a)(2) does not  
 apply to them. Accordingly, [plaintiffs] cannot seek attorneys' fees  
 and costs under Rule 41(a)(2), and their request for fees and costs is  
 DENIED.

22 *Id.*; see also *Cadkin v. Loose*, 569 F.3d 1142, 1145 (9th Cir. 2009) (embracing the Supreme Court's  
 23 material-alteration test from *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health &*  
 24 *Human Res.*, 532 U.S. 598, 604 (2001) and holding that a party voluntarily dismissed under Rule  
 41(a)(1) is not a prevailing party, and is not entitled to prevailing party attorney fees and costs).

25 Here, the POA had filed neither an answer nor a motion for summary judgment at the time it  
 26 was dismissed under Rule 41(a)(1)(A)(i). As a result, it cannot seek attorney fees and costs, and its  
 27 motion must be denied.  
 28

**B. Federal Law Governs This Motion.**

In support of its argument that state-law governs, the POA cites a single case, *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1167-68 (9th Cir.), for the blanket rule that, “[t]he Ninth Circuit has held that section 1021.5 applies in federal courts.” (POA Memorandum, p. 5:7-9.) To the contrary, section 1021.5 applies in federal courts only where the federal court exercises supplemental jurisdiction over and decides a state law claim.

In *Carmel-By-The-Sea*, the district court *exercised* jurisdiction over plaintiffs’ state-law California Environmental Quality Act claim and adjudicated its merits. Specifically, the court granted summary judgment on plaintiffs’ state-law and federal-law claims. 123 F.3d at 1147. On appeal, the Ninth Circuit reversed this holding (in part) with respect to both state and federal claims, and directed the district court to reconsider plaintiffs’ entitlement to fees *under both federal and state law*. *Id.* at 1167-68. The Ninth Circuit’s opinion contains no discussion of the basis for its fee directive to the district court, but it is entirely consistent with the rule embraced by Ninth Circuit case law such as *MRO Communications, Inc. v. American Telephone & Telegraph Co.*, 197 F.3d 1279, 1281 (9th Cir. 1999): only if the federal court exercises jurisdiction over, and decided, state-law claims does state-law governs fee requests with respect to those state-law claims. *See also Delson v. Cyct Mgmnt Group Inc.*, No. C 11-03781-MEJ, 2013 U.S. Dist. LEXIS 62499, at \*7 (N.D. Cal. April 30, 2013) (“[T]o the extent that the Court is exercising supplemental jurisdiction over Plaintiff’s state law claims, the Court may also award attorneys’ fees pursuant to [California law].”). Here, the District Court never exercised subject-matter jurisdiction over or addressed the City’s state-law claims, and therefore federal law applies.

In summary, unlike in *Carmel-By-The-Sea* where the court exercised jurisdiction, here the Court has not done so, and federal law applies to the POA’s attorney fee motion. Consequently, the POA’s motion must be denied because, under federal law, a plaintiff who is voluntarily dismissed under Rule 41(a)(1)(A)(i) is not entitled to attorney fees or costs.

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**II. EVEN IF CALIFORNIA LAW GOVERNED – WHICH IT DOES NOT – THE POA IS NOT ENTITLED TO ATTORNEY FEES OR COSTS UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1021.5.**

Realizing that attorney fees are foreclosed to them under federal law, the POA attempts to muster a claim for fees under California Code of Civil Procedure section 1021.5 (henceforth “section 1021.5”). That section, which codifies California’s Private Attorney General Doctrine, permits a part to seek fees for public-interest litigation if the party satisfies certain elements. Specifically, a fee applicant must demonstrate that:

(1) the applicant was a successful party, (2) in an action that resulted in (a) enforcement of an important right affecting the public interest and (b) a significant benefit to the general public or a large class of persons, and (3) the necessity and financial burden of private enforcement of the important right make an award of fees appropriate.

*Karuk Tribe of Northern Cal. v. Cal. Regional Water Quality Control Bd., North Coast Region*, 183 Cal.App.4th 330, 363 (2010). Here, the POA is unable to satisfy these elements, and thus, even if California law applied, its motion must be denied.

First, the POA cannot raise even a marginal argument with respect to being a “successful” party. To do so, the POA appears to be claiming that its motion to dismiss (its litigation for purposes of section 1021.5) caused the City to voluntarily dismiss its complaint. Not only is the POA unable to show this, it has not even tried. As discussed below, the evidence shows that the City’s decision to dismiss the POA under Rule 41(a)(1)(A)(i) was based solely on the state court’s refusal to stay the consolidated state-court actions.

Second, the POA did not enforce important rights through its federal motion to dismiss. The POA’s argument is premised upon a mistaken assumption that it would have prevailed on its motion to dismiss. This did not happen. The Court did not rule that the City’s action was unripe or was improperly in federal court.

Finally, the POA’s motion must be viewed against the backdrop of the current legal landscape: the parties continue to vigorously litigate Measure B in state court. The City’s dismissal of the POA did not invalidate Measure B, or bring the POA any closer to achieving its goal of invalidating Measure B. Ultimately, the City believes it will prevail, and that Measure B will be upheld.

1           **A.     The POA Is Not a “Successful Party” Because It Cannot Establish the Catalyst**  
 2           **Theory’s Causation Prong.**

3           Without explicitly saying so, the POA premises its claim to being a “successful” party on the  
 4 catalyst theory. Under that theory, “attorney fees may be awarded even when litigation does not  
 5 result in a judicial resolution if the defendant changes its behavior substantially because of, and in  
 6 the manner sought by, the litigation.” *Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553, 566  
 7 (2004). Thus, the party seeking fees must satisfy the catalyst theory’s causation prong.

8           To satisfy the causation prong, the plaintiff must show that its litigation was “a substantial  
 9 factor contributing” to the adverse party’s action. *Cates v. Chiang*, 213 Cal.App.4th 791, 807  
 10 (2013).

11                     “Put another way, courts check to see whether the lawsuit initiated by  
 12                     the plaintiff was ‘demonstrably influential’ in overturning, remedying,  
                       or prompting a change in the state of affairs challenged by the  
                       lawsuit.”

13 *Karuk Tribe of Northern Cal. v. Cal. Regional Water Quality Control Bd., North Coast Region*, 183  
 14 Cal.App.4th 330, 363 (2010). Telling, the POA does not even mention the causation prong in its  
 15 argument.

16           Here, under the POA’s theory, the POA would need to show that its motion to dismiss was a  
 17 substantial factor in the City’s decision to voluntarily dismiss its federal action. But the POA does  
 18 not even attempt to make this showing. (See POA Memorandum at 5:17-6:17.) Instead, the City  
 19 has been clear all along that its decision was based on the state court’s refusal to stay the state-court  
 20 actions, and Court is required to consider the City’s stated reasons:

21                     Moreover, the [party contesting the fee motion] knows better than  
 22                     anyone why it made the decision that granted the ... the relief sought,  
 23                     and the [contesting party] is in the best position to either concede that  
                       the [opposing party] was a catalyst or to document why the [the  
                       opposing party] was not.

24 *Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553, 573 (2004).

25           The City dismissed its federal suit to avoid the expense of a multiplicity of actions. (Ross  
 26 Decl., ¶9.) The City did not dismiss its federal action because it feared losing the motion to dismiss.  
 27 (*Id.* at ¶10.) On the contrary, the City believed, and continues to believe, it would have prevailed.  
 28 (*Id.*) But such a victory – in light of the state court’s ruling denying the stay motion – would have

1 resulted in a simultaneous adjudication in both state and federal court, which would have been  
 2 expensive and an inefficient use of public resources. (*Id.*) The City's filings have consistently  
 3 emphasized this reason for the City's dismissal of the federal action. (*Id.* at ¶9, Ex. C; Docket No.  
 4 83.) On August 23, 2012, the State Court ruled that the state court actions would be consolidated,  
 5 but would proceed in state court. (*Id.* at ¶7, Ex. A.) On September 26, 2012, the City wrote this  
 6 Court, alerting it to the State Court's rulings, and informing this Court that the City would be  
 7 dismissing its federal declaratory relief action in or to preserve public resources by avoiding  
 8 simultaneous litigation. (*Id.* at ¶9, Ex. B; Docket No. 76.)

9 The POA, to bolster its claim to being a successful party, relies on *Wal-Mart Real Estate*  
 10 *Business Trust v. City Council of the City of San Marcos*, 132 Cal.App.4th 614, 618-19 (2005). But  
 11 Wal-Mart, rather than support the POA's fee motion, highlights why the POA is not a successful  
 12 party here.

13 In *Wal-Mart*, the private parties seeking section 1021.5 fees opposed a Wal-Mart petition for  
 14 writ of mandate that sought to block an anti-Wal-Mart referendum. *Wal-Mart Real Estate Business*  
 15 *Trust v. City Council of the City of San Marcos*, 132 Cal.App.4th 614, 618-19 (2005). After  
 16 considering the oppositions, the court denied Wal-Mart's petition and permitted the referendum to  
 17 take place. *Id.* at 621-22. In its order, the court acknowledged that its ruling was based on the  
 18 grounds argued by the private parties. *Id.* at 622 ("The court's judgment expressly states its ruling  
 19 was based on [the private parties'] opposition, and indeed, they were the only parties involved in  
 20 this appeal who opposed the petition."). As such, in *Wal-Mart*, the causality prong could not have  
 21 been more explicitly established. Here, however, the opposite is true, and the fee request must be  
 22 denied on this basis alone. This Court never ruled on the POA's motion, and thus there is no basis to  
 23 find the POA's motion was a catalyst for the City's actions.

#### 24 **B. The POA Did Not Vindicate "Important Rights."**

25 In its memorandum, the POA identifies two "important rights" allegedly vindicated by its  
 26 motion to dismiss: (1) "the right of all San Jose city employees' [sic] to be free from the City's  
 27 unripe action and an improper advisory opinion on a ballot measure affecting their pension rights"  
 28 (POA Memorandum at 7:14-17); and (2) the "principal that California courts have a strong interest

1 in deciding the legality of state laws such as Measure B in the first instance” (POA Memorandum at  
2 8:1-4). But the POA vindicated no such rights.

3 First, with respect to the alleged right to “be free from the City’s unripe action,” the Court  
4 *never* ruled on the POA’s ripeness argument. Nevertheless, the POA’s argument is premised on a  
5 ruling that the City’s action was unripe. On the contrary, the City adamantly disagrees with the  
6 POA and contends that its FAC would have survived the motions to dismiss. In fact, when the  
7 POA’s federal co-defendants (San Jose Firefighters) filed the initial motion to dismiss, they did not  
8 even bother to make the POA’s strained justiciability arguments. (Docket. 9.)

9 The facts here (where the court did not rule on the POA’s motion) are diametrically opposed  
10 to those in the POA’s allegedly supporting authority, *Wal-Mart v. City of San Marcos, supra*, 132  
11 Cal.App.4th 614 (2005). In *Wal-Mart*, the court *did* rule on ripeness, and held that Wal-Mart’s  
12 action was unripe. *Id.* at 621-22. But here, the Court did not rule on the issue; the POA’s attempt to  
13 recover fees for a legal victory it never achieved should be rejected.

14 Second, with respect to the San Jose city employees’ alleged right to have the  
15 constitutionality of Measure B “determined in state court,” (POA Memorandum at p. 2:1), the Court  
16 never ruled on the POA’s abstention arguments. Again, the City adamantly contends that the Court  
17 would have rejected the POA’s motion to dismiss in its entirety. The POA’s fee request is  
18 predicated on the mistaken belief that it would have prevailed on its motion to dismiss and that the  
19 federal case would not have continued. Additionally, this “important right” strays dangerously  
20 close to rejecting the doctrine of concurrent jurisdiction, under which parties may properly bring the  
21 same cause of action in two different courts.<sup>1</sup>

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22  
23 <sup>1</sup> The “importance” of pursuing vested-rights claims in the first instance in state court is not a view  
24 shared by all unions and public employees. Frequently, they choose to pursue vested-rights claims  
25 in federal court. *See, e.g., Hanford Executive Mgmt Employee Ass’n v. City of Hanford*, No. CV-  
26 00828-AWI-DBL, 2012 U.S. Dist. LEXIS 23161, (E.D. Cal. Feb. 23, 2012). In *Hanford Executive*  
27 *Mgmt, supra*, a union (represented by the firm of Carroll Burdick & McDonough, who represent  
28 POA here) filed a lawsuit *in federal court* alleging that City had violated its members rights under  
both the California and federal constitution contract clauses by requiring increased employee  
retirement contributions and lower retirement benefits.

Moreover, despite its arguments in this Court, the POA, along with the other plaintiffs in the state court actions, stipulated that the City could bring its federal claims in state court, permitting the City to file its declaratory relief action as a cross-complaint. (Ross Decl., ¶13.) No party moved to dismiss those claims and they are set for trial in July along with the plaintiffs state law claims. (*Id.* at ¶14.)

Consequently, because the POA has failed to demonstrate that it vindicated an “important right,” its request for fees under 1021.5 must be rejected solely on the basis of this failure.

**C. The POA’s Motion Ignores that Measure B Is Being Vigorously Litigated in State Court.**

Ultimately, the primary relief sought by the POA is the invalidation of Measure B, and the City’s voluntarily dismissal of its federal action did not provide this relief. On the contrary, the parties continue to vigorously litigate Measure B in state court, where the City believes Measure B will be upheld. The City’s motion for summary adjudication is set for hearing on June 7, 2013 and trial is set to begin on July 22, 2013.

**III. THE AMOUNT OF THE POA’S FEE REQUEST IS UNREASONABLE**

Given that the POA is not entitled to fees under either federal or state law, the Court should never address whether the amount of the POA’s fee request is reasonable. Out of an abundance of caution, the City objects to that amount, which is unreasonable in light the ongoing Measure B litigation. In the Ninth Circuit, courts must consider “the results obtained” in determining the reasonableness of a fee request. *Gens v. Wachovia Mortgage Corp.*, 10-CV-01073-LHK, 2011 U.S. Dist. LEXIS 97401, \*9 (N.D. Cal. Aug. 30, 2011).

First, the Measure B litigation is continuing in full force in state court. The POA obtained no substantive ruling regarding Measure B in federal court. In this context, it is unreasonable to award the large amount of fees requested by the POA.

Second, the POA did not even “obtain” a dismissal with prejudice. The City’s voluntary dismissal without prejudice under Rule 41(a)(1)(A)(i) “leaves the parties as though no action had

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1 been brought.” *Wilson v. City of San Jose*, 111 F.3d 688, 692 (1997). It would be unreasonable to  
2 award the POA over \$60,000 in fees when the parties stand as though no federal action had been  
3 brought with the Measure B litigation continuing unabated.

4 Third, the POA’s federal motion to dismiss, as discussed above in the context of its  
5 ineligibility for Section 1021.5 fees, did not cause the City to dismiss its federal action. To the  
6 extent the POA “obtained” a result, it is the beneficiary of the state-court ruling. As such, it would  
7 be unreasonable to award the POA the large amount of fees it requests for federal litigation that did  
8 not cause the “result.”

9 Additionally, the number of hours the POA expended on its motion to dismiss – over 180  
10 hours according to its fee request – is unreasonable. According to the POA’s supporting  
11 declarations, its attorneys could all “see that a motion to dismiss for lack of subject matter  
12 jurisdiction was an appropriate response” simply from reviewing the complaint. (Adams Decl.,  
13 3:14-16; Martinez Decl. 3:22-24; West Decl, 3:1-4.) It is unreasonable that they then took 180  
14 hours (or over four weeks of full time work for an attorney) to draft a single motion to dismiss and a  
15 reply brief.

16 Finally, the POA seeks recovery for hours it spent *after* the City informed the POA of the  
17 City’s intention to proceed solely in state court in light of the state court’s denial of its motion-to-  
18 stay. (Ross Decl., ¶7, Ex. B (Ross Sept. 4, 2012 letter to counsel for federal defendants).) In other  
19 words, the POA elected to continue incurring legal fees for work that it knew would be unnecessary.  
20 The decision to do so is patently unreasonable, and the POA should not be awarded any fees  
21 incurred for work after receiving Ms. Ross’s September 4, 2012 letter.

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1 **IV. CONCLUSION**

2 In conclusion, federal law applies to the POA's fee request, and the POA is not entitled to  
3 fees under federal law because it was dismissed without prejudice under Rule 41(a)(1)(A)(i).  
4 Furthermore, even if California law applies, the POA is still not entitled to fees. It cannot establish  
5 that its federal motion to dismiss caused the City to file the Rule 41(a)(1)(A)(i) dismissal or that the  
6 POA's motion to dismiss vindicated important rights. At present, the parties continue to vigorously  
7 litigate Measure B in state court, and the POA's motion did not result in any judicial finding that  
8 Measure B is invalid in any respect. Its fee request must be denied.

9 DATED: May 7, 2013

MEYERS, NAVE, RIBACK, SILVER & WILSON

11 By: /s/

12 Linda M. Ross

13 Attorneys for City of San Jose

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